

Montana Water Court  
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IN THE WATER COURT OF THE STATE OF MONTANA  
LOWER MISSOURI DIVISION  
MUSSELSHELL RIVER ABOVE ROUNDUP BASIN (40A)  
PRELIMINARY DECREE

\* \* \* \* \*

CLAIMANTS: Russell A. Berg; Donna C. Hagberg; Keating  
Family Living Trust; Larry D. Walker; Lisa J.  
Walker

**CASE 40A-0435-R-2022**

40A 110288-00

40A 110289-00

OBJECTOR: United States of America (USDA Forest Service)

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

## **MASTER'S REPORT**

The above-captioned claims appeared in the Preliminary Decree for the Musselshell River above Roundup (Basin 40A) issued on June 7, 2017. Claim 40A 110288-00 is co-owned by Russell A. Berg, Donna C. Hagberg, the Keating Family Living Trust, Larry D. Walker, and Lisa J. Walker. Claim 40A 110289-00 is co-owned by Larry D. Walker and Lisa J. Walker. Both claims received objections from the United States Department of Agriculture, Forest Service. Claim 40A 110289-00 also received issue remarks. Issue remarks are notations identifying potential legal or factual issues with water rights and the Water Court is required to resolve these potential issues.

### **FINDINGS OF FACT**

#### **40A 110288-00**

1. Claim 40A 110288-00 appeared in the Basin 40A Preliminary Decree as a claim for stock drinking directly from a spring in the NWNESE of Section 16, T9N, R9E, Meagher County.

2. The Forest Service objected to the claim, and the claim received the following issue remarks:

BASED ON VERBAL INFORMATION PROVIDED TO THE LEWISTOWN REGIONAL OFFICE ON 03/06/2017,  
THE PLACE OF USE IS ACTUALLY LOCATED IN THE SWNWSE SEC 16 TWP 9N RGE 9E MEAGHER CO.  
BASED ON VERBAL INFORMATION PROVIDED TO THE LEWISTOWN REGIONAL OFFICE ON 03/06/2017,  
THE SPRING IS ACTUALLY LOCATED IN THE SWNWSE SEC 16 TWP 9N RGE 9E MEAGHER CO.

3. The parties filed a stipulation to resolve the Forest Service's objection and the issue remarks. (Doc.<sup>1</sup> 6.00).

4. The stipulation requests the point of diversion and place of use be modified to the SWNWSE of Section 16, T9N, R9E, Meagher County, as suggested by the issue remarks.

5. The stipulation also requests the following information remark be added to the claim:

**THE POINT OF DIVERSION AND PLACE OF USE ARE LIMITED TO  
PRIVATE LAND.**

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<sup>1</sup> "Doc." numerical references correlate to case file docket numbers in the Water Court's Full Court case management system.

## 40A 110289-00

6. Claim 40A 110289-00 appeared in the Basin 40A Preliminary Decree as a claim for stock drinking directly from a spring in the SENESE of Section 16, T9N, R9E, Meagher County.

7. The stipulation also requests the following information remark be added to the claim:

**THE POINT OF DIVERSION AND PLACE OF USE ARE LIMITED TO PRIVATE LAND.**

### PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. The Water Court is not bound by parties’ settlement agreements. Any settlement reached by the parties is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

6. 27. Information remarks are “[r]emarks that limit, define, or explain unique aspects of a claim....” Rule 2(a)(57), W.R.C.E.R.

[M]any water rights cannot be accurately described by elements alone, and are therefore supplemented with information remarks.... Information remarks provide facts regarding prior use of a right that are critical to its administration in accord with historical use. ...[I]nformation remarks are routinely used by the Water Court to supplement abstracts.

### CONCLUSIONS OF LAW

#### **40A 110288-00**

1. The issue remarks and objections overcome the prima facie status of claim 40A 110288-00. The historical location of the spring is in the SWNWSE of Section 16, T9N, R9E, Meagher County. The point of diversion and place of use should be modified. These modifications resolve the issue remarks, and the remarks should be removed from the claim abstract.

2. The information remark stating the point of diversion and place of use are on private land should be added to the claim. The modifications to the point of diversion and place of use and the addition of the information remark resolve the Forest Service's objection to claim 40A 110288-00.

#### **40A 110289-00**

3. The information remark stating the point of diversion and place of use are on private land should be added to the claim. The modifications to the point of diversion and place of use and the addition of the information remark resolve the Forest Service's objection to claim 40A 110289-00.

#### **RECOMMENDATIONS**

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

A post decree abstract of each water right claim reflecting the recommended changes is attached to this Report.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service via USPS Mail:**

Russell A. Berg  
PO Box 83  
Martinsdale, MT 59053

Donna C. Hagberg  
PO Box 217  
Harlowton, MT 59036

Keating Family Living Trust  
PO Box 261  
Harlowton, MT 59036

Larry D. Walker  
Lisa J. Walker  
PO Box 11641  
Bozeman, MT 59719

Joseph T. Mathews  
US Dept of Justice  
PO Box 7611  
Washington, DC 20044

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US Dept of Justice, ENRD-NRS  
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MontanaBasins.ENRD@USDOJ.GOV

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**MUSSELSHELL RIVER, ABOVE ROUNDUP**  
**BASIN 40A**

**Water Right Number:** 40A 110288-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** DONNA C HAGBERG  
PO BOX 217  
HARLOWTON, MT 59036 0217

RUSSELL A BERG  
PO BOX 83  
MARTINSDALE, MT 59053

LARRY D WALKER  
PO BOX 11641  
BOZEMAN, MT 59719

LISA J WALKER  
PO BOX 11641  
BOZEMAN, MT 59719 1641

KEATING FAMILY LIVING TRUST  
PO BOX 261  
HARLOWTON, MT 59036 0261

**Priority Date:** MAY 17, 1917

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** SPRING, UNNAMED TRIBUTARY OF SOURDOUGH CREEK

**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNWSE	16	9N	9E	MEAGHER

**Period of Diversion:** MAY 1 TO OCTOBER 15

**Diversion Means:** FLOWING

**Period of Use:** MAY 1 TO OCTOBER 15

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SWNWSE	16	9N	9E	MEAGHER

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**Remarks:**

THE POINT OF DIVERSION AND PLACE OF USE ARE LIMITED TO PRIVATE LAND.

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**MUSSELSHELL RIVER, ABOVE ROUNDUP**  
**BASIN 40A**

**Water Right Number:** 40A 110289-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** LARRY D WALKER  
PO BOX 11641  
BOZEMAN, MT 59719  
  
LISA J WALKER  
PO BOX 11641  
BOZEMAN, MT 59719 1641

**Priority Date:** MAY 17, 1917

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** SPRING, UNNAMED TRIBUTARY OF SOURDOUGH CREEK

**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENESE	16	9N	9E	MEAGHER

**Period of Diversion:** MAY 1 TO OCTOBER 15

**Diversion Means:** FLOWING

**Period of Use:** MAY 1 TO OCTOBER 15

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SENESE	16	9N	9E	MEAGHER

---

**Remarks:**

THE POINT OF DIVERSION AND PLACE OF USE ARE LIMITED TO PRIVATE LAND.